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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JACKIE HOLDER, individually and in his official capacity as County Commissioner for Bleckley County, Georgia, and ROBERT JOHNSON, individually and in his official capacity as superintendent of elections for Bleckley County, Georgia,

Petitioners,

v.

REV. E. K. HALL, SR., DAVID WALKER, U.S. DONALDSON, RICHARD HARRIS, WILLIE ATES, REV. WILSON C. ROBERSON, and NAACP Chapter of Cochran/Bleckley County,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that governance by a single county commissioner, rather than a multi-member board of commissioners, is subject to challenge as dilutive under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. *Holder v. Hall,* 113 S. Ct. 1382 (1993).

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BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Com-

mittee's work. The Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the past thirty years, and has frequently represented litigants before this Court, *see, e.g., Clark v. Roemer*, 111 S. Ct. 2096 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); *Connor v. Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

SUMMARY OF ARGUMENT

The Eleventh Circuit properly concluded that the Voting Rights Act permits minority voters to challenge as dilutive Bleckley County's governance by a single county commissioner, rather than a multi-member board of commissioners. Without any basis in the statute or legislative history, petitioners ask this Court to carve out an exception from Section 2 for single-member offices. This attempt conflicts with this Court's rejection of such an exception in *Houston Lawyers' Ass'n v. Attorney General of Texas*, 111 S. Ct. 2376, 2381 (1991), and conflicts with this Court's analogous Section 5 jurisprudence. The Act's language, legislative history, and purpose demonstrate that Congress intended the Act to cover all elections and to eliminate any structure or procedure that results in minority vote dilution.

The concentrated power of Bleckley County's sole commissioner form of government is an extreme form of at-large election that is non-existent in other states and highly unusual even in Georgia. In determining whether minority votes were diluted by this structure, the Eleventh Circuit properly considered a five-member commission as a benchmark for measuring vote dilution because the use of a five-member commission is firmly rooted in state law and practice in Georgia. Indeed, Georgia law specifically authorizes Bleckley County to adopt a five-

member commission. Because respondents are seeking an alteration of the election system that would *conform* the practice in Bleckley County to the practice existing throughout most of Georgia, it is simply unrealistic to argue that altering the sole-commissioner government would be unduly disruptive of established state policy.

Determining an accepted benchmark for a vote dilution claim is not a novel exercise under the Voting Rights Act. In the context of challenges to at-large, multi-member election schemes, the accepted benchmark is a voting plan with single-member districts. Similarly, when a five-member commission form of government is in general use throughout a state, that standard-sized commission provides an available benchmark for a challenge to a sole-commissioner form of government.

Permitting respondents to challenge the discriminatory impact of Bleckley County's sole-commissioner government, therefore, creates no right to proportional representation, contrary to petitioners' argument. Georgia's common practice of using a five-member commission, and the availability of this state-law benchmark for respondents' vote dilution claim, means that recognizing respondents' claim does not create an unlimited right to alter the size of the elected body arbitrarily until one or more majority black districts can be created.

Finally, elections for single-member offices may give rise to a number of Section 2 claims. The violation alleged in this case is one example of the many ways a single-member office may violate Section 2. Single-member offices may be coupled with a wide variety of mechanisms that dilute the votes of minority groups—such as majority vote requirements, discriminatory slating, and the establishment of difficult registration and voting procedures. Federal courts must retain the authority to eliminate dilutive mechanisms in a manner that gives minority voters an equal opportunity to participate in the political process and to elect representatives of their choice.

ARGUMENT

I. SECTION 2 OF THE VOTING RIGHTS ACT APPLIES TO THE PRACTICE OF ELECTING A SOLE COUNTY COMMISSIONER.

A. This Court Has Held That There Is No Single-Member Office Exception to Section 2.

Petitioners urge this Court to adopt a "single-member office" exception to the Voting Rights Act. They argue that if minority groups are not able to elect their preferred candidate to a single-member office, vote dilution cannot occur because "there can be no equal opportunity for representation within an office filled by only one person." Pet. Br. at 19. This view is irreconcilable with Section 2.[1]

In *Houston Lawyers' Ass'n v. Attorney General of Texas*, 111 S. Ct. 2376, 2381 (1991), this Court squarely held that there is no "single-member office" exception to Section 2. Plaintiffs challenged as dilutive the at-large, countywide method of electing Texas trial court judges in ten counties. An *en banc* majority of the Fifth Circuit held that the results test of Section 2 did not apply to judicial elections since they were not "representatives" within the statutory language of Section 2. 914 F.2d 620 (5th Cir. 1990). In his concurrence, Judge Higginbotham characterized the trial judges "as single-office holders instead of members of a multi-member body" because each exercises his or her authority independent of the other judges serving in the same area or on the same court. 914 F.2d at 649. Relying upon the same case petitioners rely upon here, Judge Higginbotham advocated

[1] Commentators uniformly have criticized the single-member exception as inconsistent with the Voting Rights Act. *See, e.g.*, Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1 (1991); Edward J. Sebold, Note, *Applying Section 2 of the Voting Rights Act to Single-Member Offices*, 88 Mich. L. Rev. 2199 (1990).

a single-member office exception since " '[t]here can be no equal opportunity for representation within an office filled by one person.' " 914 F.2d at 649 (quoting *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986)).

This Court reversed the Fifth Circuit, holding that "the coverage of the Act encompasses the election of executive officers and trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected." 111 S. Ct. at 2380. In so holding, this Court rejected a single-member exception, concluding that the "concerns expressed in Judge Higginbotham's concurring opinion" were not relevant "to the threshold question of the Act's coverage."[2] *Id.* The single-member office structure was possibly "relevant either to an analysis of the totality of the circumstances that must be considered in an application of the results test embodied in § 2" or relevant "to a consideration of possible remedies in the event a violation is proved." *Id. Houston Lawyers'* thus stands for the proposition that single-member offices are not exempt from challenge under Section 2.[3] At most, the state's interest in maintaining such a structure should be consid-

[2] This holding necessarily rejects the contrary language in *Butts* relied upon by Judge Higginbotham. In any event, the *Butts* decision did not involve a challenge to a single-member office, but only involved a challenge to a runoff election rule. The court expressly stated that "[w]e need not determine whether [an equal opportunity for representation] could ever be denied in the context of an election to a single-member office" and restricted its holding to the determination that the runoff requirements do not violate the Voting Rights Act. *Butts*, 779 F.2d at 149.

[3] *Houston Lawyers'* also rejected *per se* rules that exclude categories of elections. *See* 111 S. Ct. at 2381. This approach is mandated by the Act's "functional" view of the political process in asking whether minority voters enjoy an equal opportunity to participate in the electoral process. S. Rep. No. 417, 97th Cong., 2d Sess. 21, 30 n.120 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 198, 208.

ered as one factor in the "totality of the circumstances" inquiry.

Petitioners' attempt to exclude one particular claim from the purview of Section 2 also conflicts with this Court's conclusion that the Voting Rights Act does not provide piecemeal coverage. The protection of minority voters' unitary right to an equal opportunity "to participate in the political process and to elect representatives of their choice" cannot be bifurcated into two kinds of claims—one covered and the other beyond the reach of the Act. *See Houston Lawyers'*, 111 S. Ct. at 2380; *Chisom v. Roemer*, 111 S. Ct. 2354, 2365 (1991). Petitioners concede that Section 2 would prohibit the *purposeful* adoption of a single-member office as a means to "defuse black voting strength." Pet. Br. at 40 n.32. But *Houston Lawyers'* and *Chisom* made it clear that the scope of Section 2's coverage cannot depend upon whether the alleged racial discrimination is intentional. The attempt to exclude vote dilution claims not supported by direct evidence of a discriminatory purpose also expressly conflicts with Congress' adoption of the "results test" in the 1982 amendments to the Voting Rights Act. *Gingles*, 478 U.S. at 43-46.[4] Petitioners' effort to apply Section 2 selectively therefore must be rejected under *Houston Lawyers'* and *Chisom*.

This Court recently confirmed that "Section 2 protected the right to vote, and it did so without making any distinctions or imposing any limitations as to which elections would fall within its purview." *Chisom v.*

[4] In the context of an election for a single-member office, Section 2 also would clearly prohibit purges of registration rolls, threats of reprisals against minority voters, the establishment of difficult registration and voting procedures, and allegations of a discriminatory slating process. This Court recognized, for example, that Section 2 would cover the practice of closing the polls at noon for a single-member office if it resulted in an "abridgment of a racial minority's opportunity to vote and to elect representatives of their choice." *Houston Lawyers'*, 111 S. Ct. at 2381.

Roemer, 111 S. Ct. at 2362; S. Rep. No. 417, at 2, *reprinted in* 1982 U.S.C.C.A.N. 177, 179.[5] Since the county commissioner is elected by popular vote, the Voting Rights Act does not permit the denial of the right of minority voters to participate in the political process and to elect representatives of their choice.

B. This Court's Section 5 Jurisprudence Supports the Conclusion That Section 2 Covers the Practice of Electing a Sole Commissioner.

This Court's interpretation of Section 5, which is governed by the same definitional terms as Section 2, establishes that the practice of electing a sole commissioner is covered by Section 2. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), Mississippi sought to change the method of selecting the county school superintendent, among other offices. The Court recognized that a change in the method of selecting that single official was subject to Section 5 requirements since it might dilute the voting strength of the county's citizens. *Id.* at 550-51, 569-70.

Similarly, in *City of Lockhart v. United States*, 460 U.S. 125 (1983), this Court interpreted the same "standard, practice or procedure" language in Section 5 as applying to changes in the size of an elected body. Lockhart initially was governed by a commission consisting

[5] The practice of electing a single official to an office in a particular geographic area is clearly a "standard, practice, or procedure" within the meaning of Section 2. 42 U.S.C. § 1973(a) (1988). The all-inclusive statutory language is not selective with respect to the type of office or structure covered by the Act. In fact, the legislative history is replete with statements that the Act applies to "all elections." *See, e.g.*, H.R. Rep. No. 439, 89th Cong., 1st Sess. 32 (1965). The United States similarly has acknowledged that Section 2 covers all elections. When the original Voting Rights Act was passed in 1965, the Attorney General stated that "[*e*]*very election* in which registered voters are permitted to vote would be covered." *Voting Rights: Hearings Before Subcommittee No. 5 of the House Judiciary Committee*, 89th Cong., 1st Sess. 21 (1965) (emphasis supplied).

of a mayor and two commissioners. Since the elections for the commissioner posts used a "numbered post" system, however, "each race was effectively a separate election for a separate office." *Id.* at 127. Lockhart subsequently adopted a new charter and chose to be governed by a city council consisting of a mayor and four councilmen. This Court concluded that the addition of the two seats was subject to preclearance under Section 5.[6] *Id.* at 131; *see also Clark v. Roemer*, 111 S. Ct. 2096 (1991) (addition of new judgeships in existing judicial districts has a potential for discrimination and is covered by Section 5).

The Solicitor General has suggested that interpretations of Section 5 are not relevant to Section 2 because "the inquiry under Section 5 is quite distinct from that under the Section 2 results test." S.G. Opp. Cert. at 12-13 n.11. The Solicitor General incorrectly implies that retrogression of minority voting strength cannot violate Section 2 unless it is the product of intentional discrimination. Federal courts have acknowledged, however, that retrogression claims are cognizable under Section 2 as well as Section 5.[7] Moreover, the Solicitor General's

[6] Just last term this Court reaffirmed the principles of *Allen* and *City of Lockhart*. *See Presley v. Etowah County Comm'r*, 112 S. Ct. 820, 827-28 (1992).

[7] *See Badillo v. City of Stockton*, 956 F.2d 884, 890-91 (9th Cir.) (reduction in the number of city council seats presented a potential violation of Section 2), *amended*, Nos. 89-15987, 89-16124, 1992 U.S. App. LEXIS 7738 (9th Cir. Apr. 27, 1992); *Nixon v. Kent County, Michigan*, 790 F. Supp. 738 (W.D. Mich. 1992) (assumes that reduction of county commission from 21 to 19 members presents a cognizable claim under Section 2); *cf. Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984) (proposed redistricting plan for the Chicago City Council, which decreased the majority black wards from nineteen to seventeen, violated Section 2 because it had a retrogressive effect), *cert. denied*, 471 U.S. 1135 (1985). Commentators also have concluded that Section 5 review requires jurisdictions to meet the mandates of both sections. *See* Laughlin McDonald, *Racial Fairness—Why Shouldn't It Apply to Section 5 of the Voting Rights Act*, 21 Stet. L. Rev. 847 (1992); Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 Yale L.J. 139 (1984).

statement in this case is contrary to the position he urged upon this Court only two years ago in *Chisom v. Roemer*. In that case, the Solicitor General argued that this Court's interpretation of Section 5 was directly relevant to the proper interpretation of Section 2:

> Two decisions by this Court construing Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, support our conclusion [that Section 2 applies to judicial elections]. The Court has twice held that Section 5 . . . applies to the election of state judges. *Martin v. Haith*, 477 U.S. 901 (1986), summarily aff'g 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court); *Brooks v. Georgia State Bd. of Elections*, 111 S. Ct. 288 (1990), summarily aff'g No. C.A. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court). Congress used the same operative language (*i.e.*, "voting qualification", etc.) in defining the scope of Sections 2 and 5 of the Act. Inasmuch as Congress is presumed to give terms the same meaning throughout a statute, *see Sullivan v. Stroop*, 110 S. Ct. 2499, 2504 (1990); *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 633 (1983), this Court's holdings in *Haith* and *Brooks* support the proposition that Section 2 applies to judicial elections.

See U.S. Br. in *Chisom v. Roemer* and *United States v. Roemer*, Nos. 90-757 and 90-1032, at 14-16 (footnotes omitted). This Court agreed with the Solicitor General's argument in *Chisom*. Relying upon the "close connection" between the scope of the two sections, this Court held that judicial elections are covered under Section 2, noting that "Section 5 uses language similar to that of § 2 in defining prohibited practices." *Chisom*, 111 S. Ct. at

2367. The Solicitor General's arguments in this case provide no basis for holding that changes in the size of an elected body are covered by Section 5 of the Voting Rights Act, but that Section 2 excludes any inquiry into the dilutive effect of maintaining a sole commissioner rather than employing a multi-member commission authorized by state law.[8]

II. MINORITY PLAINTIFFS MAY ESTABLISH VOTE DILUTION BY THE USE OF A SOLE COUNTY COMMISSIONER FORM OF GOVERNMENT WHEN STATE PRACTICE PROVIDES A BENCHMARK FOR INCREASING THE SIZE OF THE ELECTED BODY.

A. Bleckley County's Sole Commissioner Is an Extreme Form of At-Large Election and Is Highly Unusual Even in Georgia.

The concentrated power of the single county commissioner in this case dramatically illustrates the dilutive and discriminatory potential of the challenged election structure. Bleckley County's sole commissioner has the "exclusive jurisdiction" to levy county taxes, to examine and audit all county funds, to control all county property, and to make "rules and regulations for the support of the poor of the county, for the county police and patrol, [and] for the promotion of health." Ga. Code Ann. § 36-5-22.1 (1992). The county commissioner also has the power to fill vacancies in county offices. *Id.* It is difficult to imagine a more powerful local official.

Bleckley County's form of governance is highly unusual. Georgia is the only state that has such a form—

[8] In determining the scope of Section 2's coverage, it is irrelevant that the sole-commissioner government in Bleckley County does not constitute a change from prior practice. Section 2's coverage does not depend upon the length of time a challenged practice has been in effect. *See, e.g., Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201, 1210 (5th Cir. 1989).

no other counties in the United States have a sole county commissioner.[9] Even in Georgia, Bleckley County's sole county commissioner is unusual—an overwhelming majority of counties in Georgia have multi-member commissions.[10] Most counties in the state are governed by a county commission consisting of 3, 5, or 7 members. A five-member commission is the most common. In fact, the Georgia legislature authorized Bleckley County to adopt by referendum a multi-member commission consisting of five commissioners elected from single-member districts and a chairman elected at-large. 1985 Ga. Laws 4406.

In its present form, Bleckley County's sole commissioner is the most extreme form of at-large elections. Combined with the majority vote requirement, this highly unusual structure virtually ensures that minority voters will be excluded from effective participation in the political process.

B. State Practice Provides an Acceptable Benchmark for Determining Whether Minority Votes Are Diluted by the Challenged Structure.

To support their argument that this electoral practice is beyond the reach of a vote dilution claim, petitioners assert that minority voters cannot have a "share of" a single-member office. Pet. Br. at 19-20. Their argument assumes that the county commissioner position must be held by a single person with all the powers remaining in that office. The Voting Rights Act provides no basis for such a limitation.

The "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and his-

[9] 1 Dep't of Commerce, *1987 Census of Governments, No. 2: Government Organization; Popularly Elected Officials* [GC87(1)-2] (issued Jan. 1990).

[10] *See* Georgia Department of Community Affairs, *County Government Information Catalog* (1989).

torical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. In the context of a challenge to a multi-member districting scheme, this Court in *Gingles* developed a three-part test for determining whether vote dilution has occurred. The minority group must show that (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) it is politically cohesive, and (3) the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances—usually to defeat the minority's preferred candidate. *Id.* at 50-51.

The essential question in such an inquiry is defining the benchmark for determining whether minority votes are diluted by the challenged structure. In its determination that minority voters successfully established vote dilution, the Eleventh Circuit used a five-member county commission as a benchmark for determining whether minority voters could constitute a majority in a single-member district. Pet. App. at 74. The court recognized that

> it is appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive.

Id. (emphasis in original). Using Bleckley County's five-member school board size and districts as a benchmark, the court concluded that the evidence at trial established that black voters could comprise a majority of the electorate in one of the five districts in Bleckley County. *Id.*[11]

[11] The district court similarly concluded that "[i]f the county commission were increased in number to six commissioners to be elected from five single member districts and if the districts were the same as the present school board election districts, a black majority 'safe' district . . . would result." Pet. App. at 12.

Petitioners object to such a benchmark, arguing that the first *Gingles* precondition requires minorities to show a potential to elect in a government body having one commissioner.[12] But if the practice of using a sole commissioner is covered by Section 2, such an interpretation would automatically bar relief whenever black citizens formed less than a majority in the jurisdiction as a whole. Since that would always be the case in challenges to the practice of electing a sole commissioner, the argument is merely another way of saying that single-member offices cannot be challenged under Section 2. That reading conflicts with this Court's holding that a single-member office theory "cannot suffice to place an election for a single-member officeholder entirely beyond the coverage of § 2 of the Act." *Houston Lawyers'*, 111 S. Ct. at 2381.[13]

Petitioners nevertheless argue that a departure from using the *challenged structure* as a benchmark has no limits. Pet. Br. at 26-27. Petitioners fear that respondents may simply add seats to an existing governing body until "proportional representation" is met. *Id.* The argu-

[12] Unlike the second and third preconditions discussed in *Gingles*, this first precondition is the only *Gingles* precondition that has no source in the language of Section 2 or in the Senate Report factors. *See* S. Rep. No. 417, at 28-29. This precondition accordingly should not be rigidly interpreted in a manner that would frustrate the broad remedial purposes of Section 2. As this Court recognized in *Chisom*, 111 S. Ct. at 2368, the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination."

[13] The argument also ignores the purpose of the first *Gingles* precondition. Minority voters must show that they possess the potential "to elect representatives *in the absence of the challenged structure or practice.*" *Gingles*, 478 U.S. at 50 n.17 (emphasis supplied). That showing is integral to demonstrating that minority voters "have been injured by that structure or practice." *Id.* Since minority voters have challenged the practice of electing a sole commissioner, *Gingles* requires them to show that they would have the potential to elect representatives in the absence of the single-member practice.

ment fails to recognize that the benchmark chosen by the Eleventh Circuit is firmly rooted in state law and practice.

The use of a five-member commission is not based on a right to proportional representation, but is based on the state's common practice of using a five-member commission. Five-member county commissions are the most common form of governance in Georgia.[14] The state legislature also specifically authorized Bleckley County to adopt by referendum a multi-member commission consisting of five commissioners elected from single-member districts and a chairman elected at-large. 1985 Ga. Laws 4406. The Eleventh Circuit also based its benchmark upon the size and districts for Bleckley County's school board—the only other countywide multi-member body. State law and practice, as well as local practice, therefore provide the basis for a five-member benchmark for determining a Section 2 violation.

Determining an accepted benchmark is not a novel concept in the Voting Rights Act. Redressability of the injury is always based on the availability of an accepted benchmark against which to measure fair minority representation. In the context of challenges to at-large, multi-member election schemes, the accepted benchmark is a voting plan with single-member districts. In the context of challenges to other types of voting practices, such as restrictive voter registration practices, majority vote requirements, or numbered posts, the benchmark is a system without those requirements. Similarly, when a five-member commission form of government is in general use throughout a state, the standard-sized commission provides an available benchmark for a challenge to a sole-commissioner form of government. The availability of this benchmark means that recognizing respondents' vote dilution claim does not create an unlimited right to alter

[14] *See* Georgia Department of Community Affairs, *County Government Information Catalog* (1989).

the size of the elected body arbitrarily until one or more majority black districts can be created.

In addition to echoing petitioners' "proportional representation" argument, the Solicitor General has made another slippery slope argument, suggesting that the application of Section 2 to single-member offices would require more than one governor, or mayor, or similar office. S.G. Opp. Cert. at 11. The argument also ignores the state policy in this case that authorizes a larger governing body. Recognizing vote dilution here would not lead to three-person governorships or the like. Respondents here are seeking an alteration of the election system that would *conform* the practice in Bleckley County to the practice existing throughout most of Georgia and the United States. If a voting practice is dilutive measured against such a pre-existing state practice, it is simply unrealistic to argue that altering the practice would be unduly disruptive of established state policy.[15] By contrast, there is no benchmark in state practice in Georgia or anywhere else in the United States for a three-person governorship. Since Bleckley County's sole-commissioner government is the exception rather than the rule in the state, the state's interest in using only one commissioner is tenuous—a factor that contributes to a finding of vote dilution under the Senate Report. *See* S. Rep. No. 417,

[15] Petitioners argue that Congress did not intend to tread upon the electoral structure set up by the state, citing *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), which did not involve a challenge under the Voting Rights Act at all. Pet. Br. at 38-39. The balance between federal and state interests has already been considered by Congress in its enactment of the Voting Rights Act, however. The state's policy behind a particular electoral system is just one factor to be considered in determining whether there is a violation or whether a particular remedy is warranted. *Houston Lawyers'*, 111 S. Ct. at 2381 (the state's interest in maintaining a particular electoral structure "is merely one factor to be considered in evaluating the 'totality of circumstances'"). The prevalence of the five-member commission reveals that the state does not have a strong interest in its unusual single-member structure.

at 29 & n.117 (the policy behind the practice is tenuous if the challenged practice "departs from past practices or from practices elsewhere in the jurisdiction").

C. The Eleventh Circuit's Benchmark in This Case Is Consistent With Federal Practice in Single-Member Office Cases and Related Section 2 Litigation.

1. *Federal Courts Have Recognized That Section 2 Permits the Consideration of an Expanded Governing Body as a Benchmark for Determining Vote Dilution.*

Federal courts have recognized the authority under Section 2 to consider an expanded size to determine whether black citizens can constitute a majority in a single-member district.[16] In *Stallings*, the Eleventh Circuit held that, in considering whether there was a violation, the district court on remand must consider whether black citizens would constitute a majority in any district under either a three-member or a five-member commission plan. 829 F.2d at 1563. Such evidence was "highly relevant" to "whether black voters in Carroll County are sufficiently numerous and compact to constitute a majority in a single member district, if single member districts were created out of the one county district." *Id.*

Similarly, in *McNeil v. City of Springfield*, black voters challenged at-large elections for a five-member city council. In considering whether the minority group could demonstrate that it was "sufficiently large and geographically compact to possess the potential to elect representatives of its choice in the absence of the challenged structure or practice," 658 F. Supp. at 1020-24, the court expanded the size of the city council to ten members. The district court concluded that using this benchmark, which was expressly authorized by state law, one Springfield district would have a black majority. *Id.*

Petitioners cite three decisions that have suggested that a Section 2 violation must be based upon the number of positions in the existing body.[17] As an initial matter, these cases were wrongly decided since *Gingles* requires that plaintiffs demonstrate their ability "to elect representatives in the absence of the challenged structure or practice." *Gingles*, 478 U.S. at 50 n.17. In any event, the cases are distinguishable since plaintiffs were challenging the at-large method of electing their governing bodies.[18] Rather than challenging the election of a single-member office, plaintiffs in those actions challenged the practice of electing a multi-member body under an at-large system. That issue is not presented in this case, which involves a rare concentration of power in a sole county commissioner. Moreover, plaintiffs in *McNeil v. Springfield Park District* and *Romero* failed to provide any basis for using an expanded governing body as a benchmark for determining a Section 2 violation.[19] By

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[16] *See Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1563 (11th Cir. 1987); *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. Ill.), *appeal dismissed*, 818 F.2d 565 (7th Cir. 1987). Moreover, federal courts have endorsed plans submitted by defendant jurisdictions that increase the size of a governing body as an option for remedying vote dilution. *See, e.g., Buchanan v. City of Jackson*, 683 F. Supp. 1545 (W.D. Tenn. 1988) (switching from three-member commission form of government to mayor-council form with nine council members).

[17] *See McNeil v. Springfield Park Dist.*, 851 F.2d 937, 946-47 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989); *Romero v. City of Pomona*, 883 F.2d 1418, 1425 n.10 (9th Cir. 1989), *overruled on other grounds*, 914 F.2d 1136, 1141 (9th Cir. 1990); *see also Overton v. City of Austin*, 871 F.2d 529, 543 (5th Cir. 1989) (Jones, J., concurring).

[18] *McNeil*, 851 F.2d at 938; *Romero*, 883 F.2d at 1420; *Overton*, 871 F.2d at 530.

[19] *See McNeil*, 851 F.2d at 946-47; *Romero*, 883 F.2d at 1425 n.10. Nor does *Overton* dispute the analysis here. The district court in *Overton* actually considered an expansion of the city council to determine geographic compactness, but nevertheless held that plaintiffs had not proven their Section 2 claim. The Fifth Circuit's affirmance did not overturn the conclusion that an expanded council could be considered. 871 F.2d at 535-36, 543.

contrast, this case involves an express state policy (and practice) authorizing a larger commission. As discussed above, the state has no strong interest in the present single-member structure,[20] nor is any such interest compromised by restructuring or expanding the commission as a means to rectify vote dilution and to diminish the concentration of power in a single-member office.

2. *Federal Courts Have Recognized That a Reduction in the Size of a Governing Body May Be Challenged Under Section 2.*

In an analogous area, federal courts have recognized that a *reduction* in the size of a governing body has a clear potential for discrimination and is subject to challenge under Section 2.[21] Section 2 clearly would be violated if such a change had a discriminatory impact. In considering whether minority voters could satisfy the first *Gingles* precondition, a court would not use as a benchmark the reduced size of the challenged governing body.[22] The court would appropriately use the size of the previous governing body since it would provide a ready benchmark for measuring the discriminatory impact on the political opportunities for minority citizens. The result should be

[20] For purposes of this analysis, the interests of the state and locality are identical. Since local governments derive their delegated powers entirely from states, localities exercise authority as agents of the states. *See, e.g., Avery v. Midland County*, 390 U.S. 474, 478-79 (1968) (relying upon the exercise of these delegated powers by local governing bodies as the basis for extending the one-person, one-vote principle to local legislative elections).

[21] *See, e.g., Badillo v. City of Stockton*, 956 F.2d at 890-91 (reduction in the number of city council seats presented a potential violation of Section 2), and *Nixon v. Kent County*, 790 F. Supp. 738 (assumes that reduction of county commission from 21 to 19 members presents a cognizable claim under Section 2).

[22] This is entirely consistent with the first *Gingles* precondition, which requires that minority voters show that they can elect representatives "in the absence of the challenged structure or practice." 478 U.S. at 50 n.17.

no different when the customary state practice is to use local governing bodies of a particular size, and minorities can show that their political opportunities have been limited by the local jurisdiction's decision to depart from that usual state practice.

D. The Slippery Slope Arguments Raised by Petitioners and the Solicitor General Ignore the Careful Limits This Court Placed Upon Vote Dilution Challenges Under the Voting Rights Act.

In the final analysis, petitioners and the Solicitor General clearly view the choice of an acceptable benchmark in isolation—as if that decision alone may satisfy respondents' burden of proof. *Gingles*, however, articulated three preconditions that respondents must satisfy. Once the threshold inquiry is made, federal courts then inquire into the "totality of the circumstances." This inquiry contemplates a "searching practical evaluation of the 'past and present reality' " of the community and a " 'functional' view of the political process." *Gingles*, 478 U.S. at 45. " 'This determination is peculiarly dependent on the facts of each case,' and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Id.* at 79 (citation omitted). This is precisely why this Court concluded that single-member office concerns may be relevant to the "totality of the circumstances." *Houston Lawyers'*, 111 S. Ct. at 2380.

Consistent with this analytical framework, Bleckley County's single-member county commission dramatically demonstrates minority vote dilution. As the Eleventh Circuit recognized, the black population in Bleckley County resides in a contiguous area that could easily constitute a majority of the electorate in one of five single-member districts. Pet. App. at 74. The court also found substantial evidence that blacks in Bleckley County are politically cohesive and that the white majority usually votes as a bloc. *Id.* at 75-85. Finally, the violation was well-supported by the extremely limited electoral success

of blacks and Bleckley County's long history of racial discrimination. *Id.* The use of a sole-commissioner government was thus not the only basis for the finding that the election structure unlawfully dilutes minority voting strength and violates Section 2; rather, that finding depended upon application of all of the factors relevant under Section 2's "totality of the circumstances" test. It is precisely a finding on these factors that will constrain courts from sliding down the slippery slope the petitioners fear.

III. EVEN IF, UNLIKE IN THIS CASE, THE NUMBER OF COMMISSIONERS COULD NOT BE INCREASED BECAUSE OF THE ABSENCE OF AN AVAILABLE BENCHMARK FOR A FIVE-MEMBER BODY, A SINGLE-MEMBER OFFICE IS SUBJECT TO CHALLENGE UNDER SECTION 2.

As established above, it is clear that the Eleventh Circuit properly concluded that respondents satisfied the first *Gingles* precondition since blacks could constitute a majority of the electorate in one of five single-member districts. Even in cases where no benchmark exists for increasing the size of the governing body, however, plaintiffs may still challenge election features having a racially discriminatory effect.

Essential to the concept of minority vote dilution is the interaction between white bloc voting against minority-supported candidates and electoral mechanisms that have a potentially vote dilutive effect. A single-member office may be coupled with a wide variety of practices that are intended to, or have the effect of, diluting the votes of minorities. Federal courts must retain the authority to eliminate this vote dilution in a way that gives minority voters an equal opportunity to participate in the political process and to elect representatives of their choice.[23]

[23] Congress provided that a federal court must "exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, at 31 (footnote omitted).

One example of a dilutive mechanism that may be challenged regardless of the multi-member or single-member form of office at issue is a majority vote requirement. Majority runoff elections require that a winning candidate receive a majority rather than a plurality of votes cast. If no candidate receives a majority, the two top finishers compete in a runoff election. Even though a minority candidate may win a plurality when he or she runs against two or more white candidates, the runoff requirement ensures that a cohesive white voting bloc can control the outcome of the election. *See, e.g., White v. Regester,* 412 U.S. 755, 766 (1973) (majority vote requirement "enhanced the opportunity for racial discrimination").

Other practices or mechanisms may exacerbate the dilutive effect of single-member offices. States and localities may establish difficult registration or voting procedures "that on their face are not discriminatory but in fact discourage a group of potential voters from casting a ballot." [24] Vote dilution also may occur by using slating groups to control the nomination process. Slating often involves the creation of a package or slate of candidates by an organization with sufficient financial or political strength to make the election merely a stamp of approval of the pre-ordained candidate group. Discriminatory slating thus operates to control effective access of minorities to the ballot.

Elections for single-member offices thus may give rise to a number of Section 2 claims. The violation alleged in this case is just one of many possible ways that elec-

[24] Chandler Davidson, *Minority Vote Dilution: An Overview, in* Minority Vote Dilution 6 (C. Davidson ed. 1984).

tions for single-member offices may cause vote dilution. This Court should eschew any interpretation of the Voting Rights Act that would place election practices outside the protection of Section 2 merely because a single-member office, rather than a multi-member office, is at issue. Only then can federal courts ensure that the Voting Rights Act provides minority voters the right to a meaningful voice in electoral decisions.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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